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No. _____

In The

Supreme Court of the United States

October Term, 1991

JOHN R. KIELY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

DID THE DISTRICT COURT DENY PETITIONER HIS RIGHT TO DUE PROCESS, TO A JURY TRIAL, TO A FAIR TRIAL, AND TO PRESENT A DEFENSE OR OTHERWISE COMMIT ERROR BY REFUSING TO GIVE SEPARATE GOOD FAITH DEFENSE THEORY OF THE CASE INSTRUCTIONS ON THE CONSPIRACY (1) TO DEFRAUD AND (2) TO CONVEY GOVERNMENT PROPERTY WITHOUT AUTHORIZATION AND IMPROPERLY INSTRUCTING ON RECKLESS DISREGARD AND OBJECTIVE REASONABLENESS AS SUFFICIENT TO SHOW SPECIFIC INTENT AND WILLFULNESS?

II.

DID THE DISTRICT COURT DENY PETITIONER HIS RIGHT TO DUE PROCESS, TO A JURY TRIAL, TO A FAIR TRIAL, AND TO PRESENT A DEFENSE OR OTHERWISE COMMIT ERROR BY GIVING INSTRUCTIONS ON THE SUBSTANTIVE OFFENSE OF UNLAWFUL CONVEYANCE AS PART OF THE CONSPIRACY INSTRUCTION UNDER SECTION 371 OF TITLE 18 OF THE UNITED STATES CODE?

III.

DID THE DISTRICT COURT DENY PETITIONER HIS RIGHT TO DUE PROCESS, TO A JURY TRIAL, TO A FAIR TRIAL AND TO PRESENT A DEFENSE OR OTHERWISE COMMIT ERROR BY REFUSING TO PERMIT THE JURY TO BE INSTRUCTED ON ACTUAL BUT UNOFFICIAL AUTHORITY OR THE DEFENSE THEORY ON THAT ISSUE?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings before the United States Court of Appeals for the Fourth Circuit were petitioner John R. Kiely (the appellant below), co-appellant Frank J. Caso, and respondent United States of America (the appellee below).

The parties to the proceedings before the trial court (United States District Court for the Eastern District of Virginia) were the petitioner (then a defendant), co-defendant Frank J. Caso, and respondent (then the plaintiff).

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

The petitioner, John R. Kiely, respectfully prays that a writ of certiorari issue to review the judgment and unpublished opinion of the United States Court of Appeals for the Fourth Circuit, filed on June 14, 1991, with rehearing denied on July 23, 1991, affirming petitioner's conviction for conspiracy (1) to defraud the United States and (2) to convey government property without authorization, in violation of Section 371 of Title 18 of the United States Code.

OPINION BELOW

The unpublished opinion of the United States Court of Appeals for the Fourth Circuit is reproduced in the Appendix to the Petition For Writ of Certiorari filed by co-defendant Frank J. Caso, No. 91-374 (dated August 30, 1991). Caso Appendix, hereinafter "Caso App.," 1-26.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit against petitioner Kiely and co-defendant Caso was entered on June 14, 1991. The judgment affirmed the June 22, 1990 conviction of petitioner Kiely for conspiracy (1) to defraud the United States government and (2) to convey government classified documents without authority, in violation of Section 371 of Title 18 of the United States Code.

On July 23, 1991, the United States Court of Appeals for the Fourth Circuit denied a timely petition for rehearing of its judgment affirming the conviction of petitioner. Caso App. 27-28.

Petitioner Kiely was sentenced on July 27, 1990. He received a split sentence of two years imprisonment with all but six months suspended on condition of two years of probation, a fine of $5,000 and a $50 special penalty assessment. App. 1-5. The judgment and commitment order was amended on September 9, 1991 to include certain recommendations regarding petitioner Kiely's conditions of confinement not relevant here. App. 6.

The statutory provision conferring jurisdiction on this Court to review the judgment of the Court of Appeals by writ of certiorari is Section 1254 of Title 28 of the United States Code.

STATUTES AND CONSTITUTIONAL AUTHORITIES INVOLVED

The Constitutional provisions involved in the case are the Due Process Clause of the Fifth Amendment and the Jury Trial and Fair Trial Clauses of the Sixth Amendment and right to present a defense guarantee of the Fifth and Sixth Amendments to the United States Constitution. The United States Code section statutory provisions are Sections 371 and 641 of Title 18 of the United States Code. These constitutional provisions and federal statutes are set forth in the Appendix to the petition for writ of certiorari filed by co-defendant Caso. Caso App. 74-76.

STATEMENT OF THE CASE

A. Procedural Summary

Petitioner John R. Kiely and co-defendant Frank J. Caso were charged by indictment in the United States District Court for the Eastern District of Virginia with conspiracy (1) to defraud the United States and (2) to convey government classified documents without authority, all in violation of Section 371 of Title 18 of the United States Code. The objects of the alleged conspiracy were (1) to defraud the United States and the Department of Defense (hereinafter "DoD") in the maintenance, control,

dissemination and protection of certain classified DoD budgeting documents (DoD Planning, Programming and Budgeting System documents – hereinafter "PPBS documents"); (2) to defraud the United States and the DoD by impeding, impairing, obstructing, defrauding and corrupting the DoD's function of maintaining a system for classifying, safeguarding and regulating access to these classified documents and granting or reviewing security clearances for access to such documents; and (3) to convey such documents without authority (a violation of 18 U.S.C. § 641). Caso App. 34-48 (only the relevant portions of the lengthy indictment are reproduced). Jurisdiction of the District Court was predicated upon Section 3231 of Title 18 of the United States Code.

Jury trial in this case commenced on June 18, 1990, and ended on June 22, 1990. Petitioner Kiely and co-defendent Caso did not dispute the allegation that they had received and conveyed classified documents. Instead, they presented substantial, indeed abundant, evidence demonstrating that the United States itself had authorized their receipt and conveyance of the classified materials and that at all times they had acted with a good faith belief in the propriety of their actions.

At the conclusion of the trial, the District Court refused to give theory of the defense instructions on good faith and authorization that were crucial to the defense. Over objection of petitioner Kiely and co-defendant Caso, the District Court also gave instructions on reckless disregard and objective reasonableness being sufficient to prove specific intent on the substantive offense of unauthorized conveyance under Section 641 of Title 18 of the United States Code. The jury returned a verdict of

guilty. On July 27, 1990, Kiely was sentenced to a split sentence[1] of two years imprisonment with all but six months suspended on condition of two years probation, a fine of $5,000 and a $50 special penalty assessment.

The Court of Appeals held that the District Court's refusal to instruct on actual but unofficial authorization was proper since unoffical authorization was insufficient as a matter of law, relying on its previous decision in *United States v. Zettl*, 889 F.2d 51, 53 (4th Cir. 1983) (authorization to convey classified documents is a function of the government and its system of accountability, not someone who happens to be in possession of the documents). As discussed, *infra*, and in the petition of co-defendant Caso, this holding is contradictory to the very DoD regulations governing possession and dissemination of classified documents by DoD personnel and defense contractor employees that *Zettl* seeks to vindicate.

The Court of Appeals further held that no separate good faith instruction was required to be given since the District Court instructed on specific intent and willfulness and the good faith instruction given applied to all objects of the alleged conspiracy. As discussed *infra*, the Courts of Appeals are split on whether a trial court must give a separate good faith theory of the defense instruction when requested and the good faith instruction actually given was expressly limited by the District Court to the third object – to convey government documents without authorization. The error was compounded by the

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[1] This is not a Sentencing Guidelines case since the alleged offense occurred before the effective date of the Guidelines.

District Court's instructing on reckless disregard of authorization and objective reasonableness as sufficient to prove willfulness in a manner directly in conflict with this Court's decision in *Cheek v. United States*, ___ U.S. ___, 111 S.Ct. 604 (1991) (willfulness requires a lack of *subjective* good faith – test is not objective reasonableness).

The Court of Appeals simply ignored any discussion of the third issue raised by petitioner – that it was error to instruct on the *uncharged* substantive offense of unauthorized conveyance of government property when instructing on the *charged* offense of conspiracy to convey government property without authorization. The Court of Appeals did not even mention the issue in denying the petition for rehearing in spite of the oversight having been specifically brought to its attention. The vast weight of authority holds that substantive instructions on the object of a conspiracy should not be given.

B. Factual Summary

Petitioner Kiely was a market research executive with Raytheon Corporation. RT 4:13-15.[2] Throughout his career at Raytheon, he had a secret government security clearance. RT 4:88-89. Beginning in the 1970's and continuing until early 1985, Kiely received and conveyed classified PPBS documents to other market research executives with secret clearances. No bribes were paid to obtain these documents; nor was any other *quid pro quo*

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[2] RT=Reporter's Transcript On Appeal (by volume and page number and sometimes by witness name).

EX=Trial exhibit.

involved. RT 3:112; 4:31. Specifically, from the late 1970's until August 1984, Kiely exchanged documents with co-defendant Frank Caso (Hughes Aircraft)[3]; Leonard Kampf (RCA); Philip Jackson (RCA); and on one occasion, Max Franklin (IBM) and Linda Couture (LTV). RT 1:257; 3:8; 3:23; 3:26; 3:76; 3:102; 3:105; 4:29.

The acts of receipt of classified PPBS documents by Kiely and conveyance to others were essentially uncontested. The core issue in the case was whether Kiely (and co-defendant Caso) acted with criminal intent, or, instead, acted with a good faith belief that his actions were lawful and authorized. A closely related key issue was whether the government had actually authorized Kiely's (and Caso's) receipt and conveyance of the classified documents through an authorized but unofficial system.

The defense demonstrated at trial that DoD personnel intentionally and purposefully released the classified PPBS documents to the defense contractor community through an unofficial yet sanctioned practice of at least twenty years duration without any notification to the defense contractor community or Kiely that the activity was unlawful; and that Kiely and his counterparts at other defense contracting companies knew of and relied upon these facts in a subjective good faith belief that their activities were lawful. Once Kiely learned that the government considered conduct similar to his to be criminal, he ceased his activities. This evidence relevant to Kiely's

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[3] Co-defendant Frank J. Caso was a market research executive with Hughes Aircraft Company throughout this time period.

good faith belief in the lawfulness of his activities and to the government's unofficial but actual authorization of such activities is summarized *infra*.

1. Kiely's Colleagues Led Kiely to Believe that DoD Officials Blessed the Distribution of PPBS Documents Through an Unofficial and Authorized Channel

John Kiely served as director of market research for Raytheon's missile systems division from 1967 until his retirement at age 65 in 1990. RT 4:13-15.

Kiely's job as director of market research was to accumulate the informational resources Raytheon needed to make marketing decisions. RT 4:17. To this end, Kiely amassed a library which stocked all relevant Congressional budget documents; Congressional hearings; trade journals; governmental directories and other reference books; and PPBS documents obtained through a government library for classified government budget documents (called TILO) from which defense contractors with appropriate clearances may obtain copies. RT 4:17, 20-23. In addition to manning the library, Kiely served as an informational clearinghouse, receiving information from Raytheon's program offices, and disseminating that information, either orally or via a newsletter, to other Raytheon personnel. RT 4:23-25.

When Kiely first came to Raytheon, he knew nothing about the PPBS system. RT 4:27. Some of Kiely's Raytheon colleagues who had PPBS information showed it to him, and explained that such information had been transmitted unofficially between the Pentagon and industry. RT 4:27, 32. These colleagues further explained that

because the PPBS documents they had did not have receipts, there was no way to log them into the Raytheon classified document accountability system. RT 4:28, 32.

In the late 1970's, Kiely began himself to obtain PPBS documents. RT 4:29. In accord with what he understood to be Raytheon's practice for handling unofficially-received classified documents, Kiely did not log these documents in. RT 4:32. Rather, Kiely destroyed all the secret material Raytheon didn't need; showed the documents to those Raytheon colleagues who had a need to know their contents; and destroyed the documents, usually within a week or two of their receipt. RT 4:32-35.

It made sense to Kiely that the government wanted industry to have the PPBS documents; and, Kiely reasoned, DoD's blessing of the documents' release overrode any restrictive markings. RT 4:35, 63, 73. Moreover, Kiely had received a PPBS document called a Program Decision Memorandum and similar PPBS documents which came into Raytheon through official channels and which Raytheon had logged in. RT 4:36-37. The fact that DoD officially gave such documents to industry increased the likelihood in Kiely's mind that DoD would also give such documents to industry unofficially. RT 4:36. *See also* EX. 3-U; RT 3:160-63.

2. Once He Learned that the Government Deemed Such Conduct Criminal, Kiely Ceased Exchanging PPBS Documents

On March 20, 1985, Kiely, while attending an Electronics Industries Association conference, read a *Wall Street Journal* article which reported that defense industry

consultant Bernard Zettl and others were under investigation for obtaining and distributing PPBS documents. RT 4:37; EX. K-23. Whereas before reading the article, Kiely believed that his possession of unreceipted documents might result in a security violation, the article was a "bombshell" (RT 1:288) which made Kiely realize that the government considered his conduct criminal. RT 4:37-38. Kiely immediately showed the article to others at the conference, and told them in effect, "That ballgame is over. I quit." RT 4:38. *See also* RT 1:287-88, 3:87-88. When Kiely returned to his office, he sent a copy of the article, as well as a copy of a *Wall Street Journal* article about Zettl which came out on March 22, 1985 (EX. K-24), to his boss. RT 4:40-41. After reading the *Wall Street Journal* articles, Kiely ceased exchanging PPBS documents. RT 4:42.

3. A Reasonable Reading of the Industrial Security Manual Sanctioned Exchange of PPBS Documents Among Cleared Contractors

The Industrial Security Manual ("ISM") regulates defense contractors' handling of classified information. Indictment ¶ 20. *See also* DoD Instruction 5220.22. The ISM explicitly provides that classified documents *may* be transmitted to any person with the appropriate clearance who has a need to know the classified information involved.[4] Caso, Kiely, and other industry witnesses

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[4] Specifically, the ISM defines "authorized persons" as "those persons who have a need-to-know for the classified information involved and have been cleared for the receipt of such information . . . . " ISM § I.3.e. "Need to know" is a

(Continued on following page)

testified that since they transmitted documents only to appropriately-cleared individuals with a need to know, they believed that the ISM authorized their conduct. Franklin RT 1:270-71; Blumhardt RT 2:28-29, 34-35; Stewart RT 2:61-62, 75-77; Stevens RT 2:83-84; Kampf RT 3:52-56; Jackson RT 3:108-10; Pinkstaff RT 2:249, 269-75; Caso RT 3:225-26, 239-41, 261-62, 276-78.

4. The DoD Unofficially Authorized Dissemination of PPBS Information to Certain Defense Contractor Employees

Two DoD officials acknowledged that they had given or had seen given PPBS documents to defense contractors. Thomas Christie, formerly a high-ranking official in the Office of the Secretary of Defense, testified that from the early 1970's until 1981, he gave Five Year Defense Plans to private individuals. RT 4:4. Carolyn Chewning, a program management officer with the Defense Advanced

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(Continued from previous page)

"determination made by the possessor of classified information that a prospective recipient, in the interest of national security, has a requirement for access to . . . , knowledge of, or possession of the classified information in order to perform tasks or services essential to the fulfillment of a classified contract or program approved by a U[ser] A[gency]." ISM § I.3.bg. Moreover, the ISM specifically states that "Responsibility for determining whether individuals' duties require that they possess or have access to, any classified information and whether they are authorized to receive it rests on the individual who has possession, knowledge, or control of the information involved, and not on the prospective recipients." ISM § I.3.e.

Research Projects Agency, testified that DoD had an unofficial policy of providing PPBS documents to defense contractors; and that she had seen Program Objective Memoranda and RDT&E summaries (PPBS documents) given to contractor employees. RT 3:192-208; EX. C-16-J. On the industry side, Raytheon Washington office employee John Carroll testified that the Pentagon program officers who were his government counterparts orally communicated classified budget information to him and his colleagues. RT 4:96, 98-102. Finally, the evidence showed that both the trade press and newspapers ran numerous articles containing PPBS information. RT 4:22-23; EXS. C-16-A - C-16-I, K-58.

5. The Beliefs of Industry Colleagues and the Conduct and Statements of Government Officials Reflected Recognition of an Authorized and Unofficial System of Dissemination

Every defense industry witness called by the government said he believed that DoD distributed PPBS documents through unofficial channels, and that he did not believe he was violating the law by exchanging them. Franklin RT 1:270-73, 279; Blumhardt RT 2:28-29, 34-35; Gray RT 2:61-62; Stewart RT 2:73, 74-76, 78; Kampf RT 3:51-55; Stevens RT 3:85-87, 89. At worst, these witnesses said they believed they may have committed administrative violations by exchanging documents without receipts. Franklin RT 1:272-73; Gray RT 2:60-62. Several witnesses testified that they understood the ISM to authorize their conduct. Kampf RT 3:56, 72-74; Pinkstaff RT 2:249; Caso RT 3:331.

That government officials knew about, and condoned, industry's receipt of PPBS documents bolstered industry employees' beliefs in the lawfulness of their conduct. DoD Comptroller Quetsch told industry representatives that he knew industry had PPBS information. RT 3:51, 71. Defense Investigative Service agents examined PPBS documents in companies' possession, and did not question the receipt or possession of any of the PPBS documents. Franklin RT 1:276; Stevens RT 2:85-87; Jackson RT 2:108-09; Kampf RT 3:59-60; Caso RT 3:276-77. When inspectors found a PPBS document Kampf had in his safe but had not yet logged into the RCA classified documents accountability system, they did not question Kampf's receipt or possession of the document, but only his failure timely to log it in. RT 3:32-33, 59-60. The same is true for RCA's Phil Jackson. RT 2:108-109.

Finally, Kiely, and the others with whom he exchanged documents did not give or receive documents from anyone without a proper security clearance and need to know. Kiely did not otherwise compromise the documents. RT 4:47.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

We agree with petitioner Caso, Caso Pet. 13, that the opinion of the Court of Appeals in regard to jury instruction issues (1) overlooks important material facts; (2) conflicts with other decisions of the Fourth Circuit Court of Appeals, with the decisions of other Courts of Appeals, with federal regulations, and with this Court's decision in

Bird v. United States, 180 U.S. 356 (1901) and the recent decision by this Court in *Cheek v. United States*, ___ U.S. ___, 111 S.Ct. 604 (1991); and (3) fails to decide all jury instruction issues raised by the petitioner.

The District Court committed reversible error by giving or refusing to give a number of jury instructions, all over defense objection, that were critical to the issues of authorization, good faith, and the conspiracy charge, and deprived petitioner of his rights to a jury trial, to a fair trial, to due process, to present a defense, and to present his theory of the defense.

A. Actual Authorization

The District Court instructed the jury that authorization under the unauthorized conveyance statute (18 U.S.C. § 641), one of the object offenses of the alleged conspiracy, required actual official authorization by a DoD official and refused to give a requested instruction on actual unofficial authorization. Over defense objection, RT 4:110-12, the court instructed the jury:

> The term without authority means the conveyance was made without the permission and consent of a Government official who is actually authorized to give that consent. In other words, it would not be enough that the defendant had the permission and consent of a Government employee unless that employee had the actual authority to give the defendant permission and consent to convey the document.

Caso App. 59-60. The defense requested the following theory of the defense instruction on authorization:

> If the evidence in this case leaves you with a reasonable doubt as to whether the Department of Defense had either officially or unofficially released the PPBS documents relevant to this case to defense contractors, you must find the defendants not guilty.

Caso App. 49. The court refused, over defense objection, to give the instruction. RT 4:110-12, 117-18.

The District Court ruled that an unofficial authorization was legally insufficient. RT 4:110-11. However, the evidence at trial demonstrated that the DoD in fact had an unofficial yet authorized system for distribution of PPBS documents to defense contractors. Franklin RT 1:270-273, 276, 279; Blumhardt RT 2:28-29, 34-35; Gray RT 2:60; Stewart RT 2:74-76; Kampf RT 3:51-56, 72-74; Stevens RT 3:82-84; Chewning RT 3:192-208, EX. C-16-J; Christie RT 4:3-5, 8-9; Caso RT 3:230.

The petition for writ of certiorari filed by co-defendant Caso describes how the defense showed through Caroline Chewning, a program management officer at the Defense Advanced Research Projects Agency, that DoD released PPBS information in an unofficial manner because DoD wanted defense contractors to have this information in a timely manner. Caso Pet. 16-17. *See also* RT 3:193-201, EX. C-16-J. Indeed, the proof at trial showed that Raytheon itself had processed a PPBS document called a Program Decision Memorandum, as well as other PPBS documents, through its regular document control channels. RT 3:160-63; 4:36. Raytheon's possession of PPBS documents like the Program Decision Memorandum, which were apparently not obtained by Kiely or his contacts, provided further evidence of the government's

desire to disseminate such documents among government contractors. RT 4:36.

The District Court's ruling precluded the jury from considering this unofficial *de facto* authorization channel as being "authorized," within the meaning of 18 U.S.C. § 641, despite the evidentiary record presented on this issue. Whether this unofficial channel was authorization was a question of fact for the jury, not the trial court, to decide.

> A criminal defendant has the right to have the jury decide all questions of fact, and it is error for the district judge to withdraw factual disputes from the jury.

United States v. Walker, 677 F.2d 1014, 1016 (4th Cir. 1982). Furthermore, "a defendant is entitled to an instruction submitting to the jury any theory of the defense for which there is a foundation in the evidence." *United States v. Hicks*, 748 F.2d 854, 857 (4th Cir. 1984).

In *Bird v. United States*, 180 U.S. 356 (1901), this Court held that a criminal defendant is entitled to a jury instruction on any theory of the defense finding support in the evidence and the law and the failure to so instruct the jury is reversible error. In *Bird* the trial court failed to instruct on a defendant's reasonable belief in self-defense. This Court found the failure to instruct on the defense theory to be reversible error.

Bird is the seminal case for the black letter law in the Courts of Appeals that a trial court must give a theory of the defense instruction that has support in the evidence and the law. *E.g., Laughlin v. United States*, 474 F.2d 444, 455 n.14 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 941 (1973);

United States v. Bayer, 156 F.2d 964, 966 (2d Cir. 1946), *rev'd on other grounds*, 331 U.S. 532 (1947); *Government of the Virgin Islands v. John*, 447 F.2d 69, 73-74 (3d Cir. 1971); *United States v. Megna*, 450 F.2d 511, 513 (5th Cir. 1971); *United States v. Duncan*, 850 F.2d 1104, 1117-18 (6th Cir. 1988), *cert. denied*, ___ U.S. ___, 110 S.Ct. 732 (1990); *see, Weaver v. United States*, 111 F.2d 603, 608 (8th Cir. 1940); *United States v. Ragghianti*, 560 F.2d 1376, 1379 (9th Cir. 1977); *United States v. Lofton*, 776 F.2d 918, 919-20 (10th Cir. 1985).

The failure of the District Court to instruct on unofficial authorization deprived petitioner of his rights to present his theory of defense to the jury and have the jury decide the issue of authorization, especially when there was abundant evidence to support it. This was reversible error.

The Fourth Circuit found no error since such unofficial authorization "was legally insufficient." Caso App. 21. However, this issue was a question of fact for the jury and it was error for the district court to withdraw this issue from the jury. *Bird v. United States, supra*. Furthermore, it was a theory of defense instruction for which there was a foundation in the evidence which the defense was entitled to present to the jury. *Id.*

The District Court's instruction on actual authority, Caso App. 22, was incorrect as a matter of law since it ignored the Industrial Security Manual regulations that bind defense contractor handling and use of classified documents and gives the authority only to the actual *possessor* of a classified document to determine the propriety of further dissemination based upon a need to

know and an appropriate security clearance. ISM § I.3(e). The Fourth Circuit's reliance upon *United States v. Zettl*, 889 F.2d 51 (4th Cir. 1989) is misplaced since the *Zettl* court did not apparently have the contradictory ISM provisions before it when it erroneously held that the possessor of the document is not entitled to determine further dissemination and *Zettl* was decided long after appellants' conduct ended.

B. Good Faith

The District Court refused to give any good faith instruction on the first and second objects of the alleged conspiracy – to defraud the United States under 18 U.S.C. § 371 – and gave inadequate instruction on good faith concerning the third object of the alleged conspiracy – unauthorized conveyance under 18 U.S.C. § 641 – and refused to give requested instructions on the defense theory of good faith.

1. Conspiracy To Defraud The United States

The District Court ruled that good faith was not a defense to a conspiracy to defraud under 18 U.S.C. § 371 (RT 4:106), and refused, over defense objection (RT 4:117-18), to give defendants' requested good faith instructions. Caso App. 49-50. Thus, the court did not give *any* good faith instruction on the first two objects of the alleged conspiracy – conspiracy to defraud the United States. This was reversible error.

As co-defendant Caso sets forth in his petition for writ of certiorari, Caso Pet. 20-23, a line of Fourth Circuit

cases stands for the proposition that the issue of good faith as negating specific intent is a jury question, which should be addressed in a jury instruction. *See Miller v. United States*, 277 F. 721 (4th Cir. 1921). *See also United States v. Thompson*, 598 F.2d 879 (4th Cir. 1979) (per curiam); *United States v. Johnson*, 337 F.2d 180 (4th Cir. 1964), *aff'd*, 383 U.S. 169 (1966); *United States v. Painter*, 314 F.2d 939 (4th Cir.), *cert. denied*, 374 U.S. 831 (1963). The Fourth Circuit's opinion herein completely overlooks all of these cases, not even citing let alone distinguishing them, although they were fully briefed by petitioner.

In so doing, and in *United States v. Fowler*, 932 F.2d 306, 316-17 (4th Cir. 1991), the Fourth Circuit has joined the District of Columbia, Sixth, and Ninth Circuits in not requiring a separate good faith instruction. *United States v. Green*, 745 F.2d 1205, 1209 (9th Cir. 1984), *cert. denied*, 474 U.S. 925 (1985); *United States v. McGuire*, 744 F.2d 1197, 1201-02 (6th Cir. 1984); *United States v. Gambler*, 662 F.2d 834, 837 (D.C. Cir. 1981). The Fifth, Eighth, and Tenth Circuits have held a separate good faith instruction is required. *United States v. Harting*, 879 F.2d 765, 767-68 & n.6 (10th Cir. 1989)(instructions on willfulness not sufficient; must be clear submission of the good faith defense as such); *United States v. Harrold*, 796 F.2d 1275, 1283 & n.9 (10th Cir. 1986), *cert. denied*, 479 U.S. 1037 (1987); *United States v. Hopkins*, 744 F.2d 716 (10th Cir. 1984)(en banc)(separate good faith instruction must be given for substantive and conspiracy counts of mail and wire fraud); *United States v. Casperson*, 773 F.2d 216, 222-24 (8th Cir. 1985); *United States v. Goss*, 650 F.2d 1336, 1344 (5th Cir. 1981). This Court has noted the split in the circuits. *Green v. United States*, 474 U.S. 925 (1985) (White and

Brennan, JJ., dissenting from denial of petition for writ of certiorari).

The holdings of the Fifth, Eighth, and Tenth Circuits requiring a separate good faith instruction are clearly the better law. Petitioner and co-defendant Caso presented abundant evidence of good faith. They showed that the Industrial Security Manual could reasonably be read to sanction their conduct. *See supra* at 10-11. They showed that DoD in fact communicated PPBS information to defense contractors and the press. *See supra* at 12. Most importantly with respect to petitioner Kiely, he showed that before he joined Raytheon in the 1970's, his predecessors received PPBS documents through unofficial channels, thus leading him to believe that the practice was sanctioned by the government. The very day Kiely learned otherwise, through a *Wall Street Journal* article describing a criminal investigation of similar conduct, Kiely ceased exchanging PPBS documents. *See supra* at 8-10. The Fourth Circuit held in this case that because the concept of good faith is *subsumed* by the "willful" or "knowledge" instruction, the trial court's instructions gave petitioner all he was entitled to – an opportunity to argue that he in good faith thought he had authorization for the documents. Caso App. at 25-26. But as the Fourth Circuit recognized in an earlier case:

> Instructing a jury that the government must prove that a defendant intended to commit an offense is quite different from explaining to the jury how the defendant can legitimately counter the government's proof of this essential element of the crime. *United States v. Miller*, 658 F.2d 235, 237 (4th Cir. 1981).

The Fourth Circuit upheld the refusal to give the good faith instruction, overlooking the above authorities and relying on *Fowler*. However, the *Fowler* situation is clearly distinguishable since in *Fowler* no good faith instruction was given, whereas here the District Court gave the instruction for only one of the three objects of the conspiracy so that the jury could only believe good faith was a defense to that object and not the other two.

In addition, the Fourth Circuit held that the good faith instruction on the conspiracy to convey without authorization magically carried over to the conspiracy to defraud counts. However, as noted above, the District Court expressly rejected this request and the jury was told good faith was only a defense to the conspiracy to convey without authorization. A jury is presumed to follow the instructions given on the law. *Greer v. Miller*, 483 U.S. 756, 766 n.8 (1987); *Richardson v. Marsh*, 481 U.S. 200, 206 (1987) (and cases cited therein).

2. Conspiracy To Convey Without Authorization

On the conspiracy to convey without authorization the District Court instructed the jury:

> It is not enough, however, for the Government to prove that the conveyance was without authority. The Government must also prove that the defendant either knew that the conveyance was without the lawful authority, or that the defendant acted with reckless disregard as to whether the conveyance was authorized.

Caso App. 60.

> It is a defense to a charge of conspiracy to convey without authority that the defendant either had actual authority or that he believed he had authority, and that this belief was reasonable under all the circumstances.

Caso App. 61.

> I have listed a lot of things that are not a defense. However, while they may not be a defense, they are matters which you may consider in determining whether the defendant reasonably believed that he had authority to convey it.

Caso App. 62.

The District Court refused to give defendants' requested good faith instructions over objection. RT 4:117-18. For the same reasons that it was error to refuse to give a separate good faith instruction applicable to a conspiracy to defraud, it was error to refuse to give them as to a conspiracy to convey without authorization.

A separate good faith instruction should have been given. *Cf., United States v. Murdock,* 290 U.S. 389, 396 (1933) (a defendant is entitled to instruction on good faith and actual belief). *Cheek* reaffirmed this portion of *Murdock. Cheek v. United States, supra,* ___ U.S. ___, 111 S.Ct. at 610.[5]

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[5] In *United States v. Pomponio,* 429 U.S. 10, 11 (1976) (per curiam) this Court held an instruction on bad faith or evil motive – i.e., good faith – was not required since bad faith or evil motive are but parts of willfullness in willfully filing false income tax returns in violation of 26 U.S.C. Section 7206(1). In *Cheek v. United States, supra,* this Court reaffirmed that no

(Continued on following page)

Furthermore, it was error to instruct, over objection, RT 4:110-12, that "[t]he Government must also prove that the defendant either knew that the conveyance was without lawful authority, or *that the defendant acted with reckless disregard as to whether the conveyance was authorized.*" Caso App. 60 (emphasis added). *United States v. Eilertson*, 707 F.2d 108 (4th Cir. 1983); *United States v. Walker, supra*, 677 F.2d at 1016-17 n.3 (4th Cir. 1982).

In addition, the Fourth Circuit's opinion overlooks *Cheek v. United States*, ___ U.S. ___, 111 S.Ct. 604 (1991), which requires only subjective reasonableness of the defendant's belief and that the prosecution must prove that the defendant voluntarily and intentionally violated a known legal duty. 111 S.Ct. at 610. *Cheek's* holding has been applied to criminal copyright laws, *United States v. Moran*, 757 F.Supp. 1046 (D.Neb. 1991), and should also be applied to the complex law regarding the handling and use of classified documents. The District Court's reckless disregard and objective reasonableness instructions were erroneous as inconsistent with *Cheek*.

C. Instruction On The Substantive Offense Of Unlawful Conveyance

Over objection, RT 4:105-10, the District Court instructed on the substantive offense of unlawful conveyance under 18 U.S.C. § 641. Caso App. 58-60. However,

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(Continued from previous page)

instruction on bad faith or evil intent – i.e., good faith – was required. In neither *Pomponio* or *Cheek* was the issue here presented – the need to give a good faith theory of the defense instruction in addition to instructions on specific intent or willfullness in a conspiracy case – resolved by this Court.

the indictment charged only the offense of conspiracy under Section 371 of Title 18 of the United States Code. We agree with the position of co-defendant Caso, Caso Pet. 25-26, that it is improper to instruct on the substantive elements of the offense that is the object of the conspiracy, since it is confusing to the jury and may result in a conviction based upon a substantive offense not charged in the indictment. *See*, Sand, *Modern Federal Jury Instructions: Criminal* ¶ 19.01 Comment (1990)("Sand"); *United States v. McCoy*, 539 F.2d 1050, 1063-64 (5th Cir. 1976), *cert. denied*, 431 U.S. 919 (1977). Neither the standard *Devitt & Blackmar* instructions, nor the pattern instructions for the various circuits, provide for instruction on the elements of the substantive offense that is the object of the conspiracy. Devitt & Blackmar, *Federal Jury Practice & Instructions: Criminal* § 27.01 *et seq.* (3d Ed. 1977); *accord, Sand,* ¶19.01 *et seq.;* Federal Judicial Center, *Pattern Criminal Jury Instructions* §§ 62-64 (1988); *Fifth Circuit Pattern Jury Instructions: Criminal Cases* at 61-65 (1983); *Federal Criminal Jury Instructions Of The Seventh Circuit* at 70-77 (1980), at 3-4 (Vol. II, 1983), at 6-7 (Vol. III, 1986); *Manual of Model Criminal Jury Instructions For The Ninth Circuit* at 112-18 (1989); *Eleventh Circuit Pattern Jury Instructions: Criminal Cases* at 70-76 (1985).

It was reversible error to instruct on the substantive offense of unlawful conveyance under 18 U.S.C. § 641. The Fourth Circuit's opinion completely overlooks and fails to discuss this issue briefed by appellants.

CONCLUSION

This petition, like the petition of co-defendant Caso, presents serious issues about (1) the obligation of a trial court to give defense theory of the case instructions consistent with *Bird v. United States, supra,* (2) the need to instruct in good faith as a defense to a conspiracy charge under 18 U.S.C. Section 371, (3) the need to instruct on authorization under the defense theory of the case, (4) the need to avoid confusion by not instructing on the *uncharged* substantive offense that is the object of the *charged* conspiracy, and (5) the need to interpret the application of the subjective reasonableness standard of *Cheek v. United States, supra,* to conspiracy offenses under 18 U.S.C. Section 371.

For all the foregoing reasons this Court should grant this petition for certiorari and that of co-defendant Caso and reverse the judgment of the Fourth Circuit.

DATED: October 14, 1991

Respectfully submitted,

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John R. Kiely

AO 245 (Rev. 8/87) Judgment in a Criminal Case

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA

V.

JUDGMENT IN A CRIMINAL CASE

JOHN R. KIELY
21 Agawam Road
Boston, MA 01720

Case Number: CR90-98-A

(Name and Address of Defendant)

Joseph Covington, Esquire
Attorney for Defendant

THE DEFENDANT ENTERED A PLEA OF:

[ ] guilty [ ] nolo contendere] as to count(s) _____ , and

[X] not guilty as to the Indictment .

THERE WAS A:

[ ] finding [X] verdict] of guilty as to the Indictment .

THERE WAS A:

[ ] finding [ ] verdict] of not guilty as to count(s) ____.

[ ] judgment of acquittal as to count(s) _____.

The defendant is acquitted and discharged as to this/these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF: Conspiracy in violation of Title 18 U.S.C. §371.

IT IS THE JUDGMENT OF THIS COURT THAT: the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of two (2) years and shall pay a fine to the United States in the sum of Five Thousand Dollars ($5,000.00); and on condition the defendant serve six (6) months in a halfway house or community treatment center authorized by the Bureau of Prisons, the remainder of the sentence of imprisonment is hereby suspended and the defendant placed on probation with supervision for a period of two (2) years, to commence upon his release from the halfway house or community treatment center upon the following terms and conditions: 1) his uniform good behavior, 2) that he pay the fine and assessment provided for in this judgment during the period of probation and 3) the standard conditions of probation contained herein.

The defendant is released on present bond pending appeal and, if the Court of Appeals affirms this Court's decision, the defendant shall maintain contact with the U.S. Marshal through counsel to voluntarily surrender at the designated halfway house or community treatment center when space becomes available.

In addition to any conditions of probation imposed, IT IS ORDERED that the conditions of probation set out on the reverse of this indictment are imposed.

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;

(2) associate only with law-abiding persons and maintain reasonable hours;

(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);

(4) not leave the judicial district without permission of the probation officer;

(5) notify your probation officer immediately of any changes in your place of residence;

(6) follow the probation officer's instructions and report as directed.

The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law may issue a warrant and revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $ 50.00 pursuant to Title 18, U.S.C. Section 3013 for count(s) _____ as follows:

IT IS FURTHER ORDERED THAT counts _____ are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall pay to the United States attorney for this district any amount imposed as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

[X] The Court orders commitment to the custody of the Attorney General and recommends:

a halfway house or community treatment center located in Massachusetts

July 27, 1990
Date of Imposition of Sentence

/s/ Albert V. Bryan, Jr.
Signature of Judicial Officer

Albert V. Bryan, Jr. /s/ (illegible)
U.S. District Judge
Name and Title of Judicial Officer

July 27, 1990
Date

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at
Date

_____, the institution designated by the Attorney General, with a certified copy of this Judgment in a Criminal Case.

_____
United States Marshal

By _____
Deputy Marshal

_____

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA	)	
V.	)	CRIMINAL NO. 90-98-A
JOHN R. KIELY,	)	(Filed September 9, 1990)
Defendant.	)	

ORDER

Upon consideration of the motion of John R. Kiely to amend the judgment and commitment order, it is hereby

ORDERED that the judgment and commitment order of July 27, 1990, is amended to include the recommendation that the defendant's confinement be governed by the ordinary rules and procedures that apply to residents of the community corrections center who are transferred from another correctional facility, and that in lieu of employment the defendant be permitted to attend to his wife's physical and psychiatric needs as recommended by her physicians. In all other respects, the judgment and commitment order of July 27, 1990, shall remain the same.

/s/ Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
September 9th, 1991